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No. 92-245

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Jay B. Bright,

Petitioner,

vs.

Rutgers, the State University, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT RUTGERS COUNCIL OF AAUP CHAPTERS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the courts below correctly determine issues of procedure governing the filing of papers and the taking of discovery?

2. Did the courts below correctly determine that plaintiff's claims against the Rutgers Council of AAUP Chapters were barred by the statutes of limitations and failure to fulfill procedural requirements?

LIST OF PARTIES
TO THIS PROCEEDING

Petitioner:

Jay B. Bright

Respondents:

Rutgers, the State University

Rutgers Council of AAUP Chapters

The Federal Bureau of Investigation, U.S. Department of Justice

The Immigration and Naturalization Service, U.S. Department of Justice

New Jersey Division of State Police

There are no parent or subsidiary companies to any party.

BRIEF IN OPPOSITION OF RESPONDENT RUTGERS COUNCIL OF AAUP CHAPTERS

Respondent Rutgers Council of AAUP Chapters respectfully requests that this Court deny the petition for a writ of certiorari. The petition raises no "special and important reasons" for granting the writ of certiorari, but merely seeks review of the correct application of Federal Rules of Civil Procedure and of the statutes of limitations to the particular facts of this case.

STATEMENT OF THE CASE

A. Proceedings Below

Jay B. Bright ("Bright"), petitioner *pro se*, filed his Complaint on September 21, 1988 against respondents Rutgers, the State University, Rutgers Council of AAUP Chapters, ("AAUP" or "the union") and several federal and state agencies. Bright had been employed by Rutgers since July 1984 as a nontenured Assistant Professor of Finance. Bright's Complaint alleged, among many claims against the other respondents, that the AAUP failed to file his grievance over his initial rank and salary in a timely way, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*; and 42 U.S.C. §§ 1981, 1983, 1985(3), 1986 and 1988. Although the Complaint invoked the pendent jurisdiction of the district court it contained no state law claims against the AAUP. Complaint.[1]

Service on the AAUP was accomplished by mail on November 9, 1988. The union acknowledged service of

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1. Petitioner proceeded on the original record below; the references are to district court docket entries.

the Complaint by signing and returning Form 18A as prescribed by Fed. R. Civ. P. 4(c)(2)(C)(ii) on November 15, 1988. On December 5, the AAUP timely applied *ex parte* for an order extending time within which to answer, under General Rule 13.B. of the United States District Court for the District of New Jersey. Opinion, January 24, 1989. That order was entered on December 8, 1988 and the union timely answered the Complaint within the extended time. Answer of AAUP. Plaintiff's motion for default judgment against the union was dismissed on January 24, 1989 because the AAUP had never been in default. Opinion and Order, January 24, 1989.

The district court dismissed the claims against the state police on Eleventh Amendment grounds. Opinion and Order, March 27, 1989. The federal parties were dismissed on grounds of sovereign immunity. Opinion and Order, April 5, 1989. The remaining parties then engaged in discovery. Bright complained virtually constantly of the failure of the court and the parties to behave as he believed the federal rules required. Discovery Order, May 26, 1991; Letter Opinion and Order, July 21, 1989; Letter Opinion and Order, October 30, 1989; Opinion and Order, October 30, 1989. Of apparent relevance to the petition is his motion to suppress transcripts of his deposition testimony, based on his claim of deficiencies in procedure. Noting that "plaintiff's position is largely frivolous," the Magistrate Judge denied the motion on September 21, 1989, permitting Bright further time to read, correct if necessary, and sign the transcripts. Letter Opinion and Order, September 21, 1989. The District Judge affirmed this order on appeal on October 30, 1989. Opinion and Order, October 30, 1989.

Bright also moved to compel more complete answers to interrogatories in "complete sentences" on September 11, 1989; the motion was denied by the

Magistrate Judge on October 30, 1989 because Bright had not complied with the local rules' requirement that he confer with counsel before moving, even after previous admonishment that he must do so. Letter Opinion and Order, October 30, 1989. Plaintiff thereafter again moved to compel discovery and, for the fourth time, for an extension of the cutoff date for discovery. That motion was stayed after plaintiff attempted to appeal various interlocutory rulings to the U.S. Court of Appeals for the Third Circuit. Letter Order, December 23, 1989.

The AAUP moved for summary judgment on several grounds, including statutes of limitations and failure to exhaust administrative remedies, filing its submissions on December 1, 1989 pursuant to court direction in its October 30, 1989 Order. Notice of Motion, December 1, 1989. Plaintiff objected that the motion should have been filed on November 23, 1989; the district court in granting summary judgment to the AAUP granted the AAUP leave, if leave were necessary, to file its motion *nunc pro tunc*. Opinion, February 20, 1991; A24-25.[2] The district court also denied plaintiff's discovery motions, as defendants had substantially complied with his requests and as plaintiff had failed to demonstrate what any additional discovery might show, or how that discovery would help him to overcome the summary judgment motion. A25. On February 20, 1991, the district court dismissed the Complaint against the AAUP, and also against Rutgers, which had filed its own summary judgment motion. Order, February 20, 1991. Plaintiff moved for reconsideration twice; it was twice denied. Orders of April 5 and May 6, 1991.

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2. "A" refers to the Petitioner's Appendix before this court.

Petitioner appealed from virtually every aspect of every order entered. Notice of Appeal; Brief on Appeal. The U.S. Court of Appeals for the Third Circuit affirmed without opinion the judgment of the district court, by judgment order dated March 16, 1992. A6-8. The petition for rehearing was denied April 15, 1992. A8-9.

B. Facts

Jay B. Bright was appointed Assistant Professor of Finance at the Camden Campus of Rutgers, the State University in July 1984. Complaint, ¶5. Rutgers is an instrumentality of the state for purposes of operating the state university. N.J.S.A. 18A.:65-1 *et seq*. Rutgers offered Bright the salary of $30,104 per annum and the rank of Assistant Professor in May 1984. Affidavit of Denise Reinhardt, December 1, 1980 ("Reinhardt Aff."), Ex. 3 at 128. Despite Bright's belief in May 1984 that the salary and rank offered him were "blatantly discriminatory" on account of his race, color and national origin, he accepted them. Reinhardt Aff., Ex. 3 at 129; Ex. 4 at 16, 22.

The Rutgers Council of AAUP Chapters is an unincorporated association that exists to represent the professional and economic interests of faculty members and other at Rutgers. 3A10.[3] At the time Bright was appointed, there was a collective negotiations agreement in effect between the AAUP and Rutgers. That agreement provided salary tables which established salaries for each instructional rank. 3A10-11. The placement of newly-appointed faculty members in rank and salary occurred by agreement between the

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3. This refers to the AAUP's appendix on appeal before the U.S. Court of Appeals for the Third Circuit.

administration and the new teacher. The AAUP did not participate at all in this process. 3A11.

The grievance procedure relevant to Bright's claim set a deadline for filing a grievance of six months from the date when the grievant should reasonably have known of the violation. Bright had the opportunity to use the grievance procedure from the moment he became employed by Rutgers. Despite his belief that he had been subject to discrimination in rank and salary at his hire in May 1984, Bright did not try to enlist the union's assistance until 1985, although he was familiar with both the union and its officers well before then. 3A14; Reinhardt Aff., Ex. 1 at 55.

In early 1985, Bright sought the advice of a union officer in Camden about his rank-and-salary complaint, which he did not then claim to be the result of discrimination against him. Reinhardt Aff., Ex. 1 at 91; Ex. 3 at 189. The officer advised Bright of his rights to grieve, and instructed him how to do that. Bright admitted that after this conversation in early 1985 he had no reason to believe the AAUP would do anything for him. Reinhardt Aff., Ex. 1 at 58-59.

Finally, in May 1985, months after learning how and when to file a grievance, Bright presented his rank-and-salary complaint in writing directly to Rutgers, not through the grievance procedure. Complaint, Ex. 2A.

Bright filed his first Charge of Discrimination about his rank-and-salary complaint with the United States Equal Employment Opportunity Commission on November 14, 1985, alleging that he had discovered the pay disparity in December 1984. The union was not named as a respondent, nor was its existence or conduct even mentioned, in this or any other EEOC charge.

Reinhardt Aff., Ex. 1 at 34 and 296. Bright was fully aware of the EEOC, its role and its procedures, having twice before in the 1970's invoked its mechanisms. Reinhardt Aff., Ex. 1 at 24-25, 28.

When the AAUP first received Bright's request and authority to act on his behalf, it filed a grievance on his behalf alleging discrimination and other ill treatment in rank salary on May 16, 1986. Keddie Aff., Ex. 16. On May 22, however, Bright directed the AAUP to withdraw the grievance it from the administration. 3A22. Meanwhile, on May 29, 1986, Rutgers had already found the grievance to be untimely, since the grievance and supporting documents indicated that Bright knew of the facts constituting the grievance in summer and fall 1984, well outside the six month filing deadline for grievances. Ex. 9 to the Complaint. Bright on June 19, 1986, refused to permit the union to act further on his behalf and charged the union with filing an "untimely and deceitful" early grievance, being negligent and deceitful, since early 1985, committing malpractice, and colluding and conspiring in regard to his case. He demanded the union pay him "$4.0 million" in damages. He declined to assist in retrieving the grievance. 3A30.

On May 8, 1986, Prof. Bright filed a second Charge of Discrimination with the EEOC against Rutgers, but again he did not name the AAUP or describe its conduct in any way. Ex. 16c to the Complaint.

On March 18, 1987, Bright filed his third Charge of Discrimination with the EEOC again neither naming nor mentioning the AAUP. Complaint, Ex. 16d.

Bright was notified by Rutgers that his three-year appointment was not renewed on April 27, 1988. 3A23. He did not grieve this nonreappointment. Bright's

employment ceased after the end of his terminal year, in May 1988. 3A23.

REASONS FOR DENYING THE WRIT

NO "SPECIAL AND IMPORTANT REASONS" EXIST FOR GRANTING THE PETITION

Rule 10.1 of the Rules of Supreme Court of the United States states, in part:

> A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.
>
> "[Sp]ecial and important reasons" do not include "an intellectually interesting and solid problem":
>
> . . . [T]his Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955), construing a predecessor to the current Rule.

In his petition, Bright has failed to distinguish his case from any of the thousands of cases in which a party feels distress over the correct application of procedural rules and the standard for summary judgment.

I. There Are No "Special And Important Reasons" To Review The Lower Courts' Correct Rulings On Discovery

The regulation of discovery proceedings is committed to the sound discretion of the district court. *Seattle Times Co. v. Rinehart*, 467 U.S. 20, 34-36 (1984). Where discovery questions have been referred to the Magistrate Judge, the District Judge may only reconsider his determination only "where it has been shown that the magistrate's order is clearly erroneous or contrary to law". 28 U.S.C. §633(b)(1)(A); Fed. R.Civ.P. 72(a). Higher courts may review discovery orders only for the abuse of discretion. *Ibid.*

The petition demonstrates no "special and important reasons" why this court should review the orderly and proper regulation of discovery proceedings before it. The petition fails even to demonstrate that there was error either by the reviewing courts, or in the original application of the rules to his discovery disputes by the Magistrate Judge.

Nor could the petitioner do so. He persistently raised what the district court described as frivolous obstructions and objections to discovery procedures conducted by respondents AAUP and Rutgers. He properly repetitively complained of nonexistent deficiencies in those respondents' discovery responses, while at the same time he refused to comply with local procedures requiring good faith efforts to resolve discovery disputes. Finally, his own appeals caused delays discovery proceedings pending resolution of his appeals.

Petitioner generally describes these proceedings as acts of fraud committed by the courts and some or all of respondents. No fraud occurred. Plaintiff was simply the recipient of discovery orders that ran counter to his solipsistic notions of how the federal rules should be read. Plaintiff's perceptions do not amount to evidence of fraud, nor do they warrant granting the writ.

II. There Are No "Special And Important Reasons" To Review The Court Of Appeals' Affirmance Of The District Court's Regulation Of Procedures Before It

The Federal Rules of Civil Procedure confer the district courts the power to "govern the procedure . . . in all suits of a civil nature." Fed.R.Civ.P.1. The rule further provides:

> They [the rules] shall be construed to secure the just, speedy and inexpensive determination of justice.

The petitioner points to numerous so-called frauds and errors in the district court's handling of this case before it. He accuses the court of wrongly granting leave to the AAUP to file papers, including its summary judgment papers, beyond the time provided for in previous scheduling order. The petition does not demonstrate how these very individualized rulings give rise to "special and important reasons". The petition does not even show any error in the way the district court regulated filings before it.

Nor could he do so, as the district court correctly ruled. The delay in filing summary judgment papers was attributable to petitioner, when he persistently refused to read and sign his depositions. Petitioner did not try to, nor could he, show any prejudice from what was, at most, a week's delay in the filing of a summary judgment motion that he wished to oppose.

Again, petitioner's unsupported and hypertichnical readings of the rules do not amount to evidence of wrongdoing or lawlessness by the courts or the parties, or to a basis for granting the writ.

III. There Are No "Special And Important Reasons" To Review The Grant Of Summary Judgment

A. The Denial of the Rule 56(f) Application

Petitioner asks review of the affirmance of the district court order denying his Fed.R.Civ.P.56(f) request for a continuance. Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

At the time of the appeal, the Third Circuit had recently announced this standard:

> [The grant or denial of a continuance] depends, in part on what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained.
>
> *Contractors Ass'n of Eastern Pa, Inc. v. City of Philadelphia*, 945 F.2d 1260, 1264(3d Cir. 1991).

As other courts have observed, summary judgment "need not be denied 'merely to satisfy a litigant's speculative hope of finding some evidence that may tend to support a complaint.'" *Meyer v. Dans un Jardin, S.A.*, 816 F.2d 533 (10th Cir. 1987). (Citations omitted.) The opponent of the motion must carry his burden to show by affidavit how additional time will enable him to rebut the movant's allegations; he may not "rely on vague assertions that additional discovery will produce needed, but unspecified, facts.'" *Id.* (Citation omitted.) *See also Childers v. Joseph*, 842 F.2d 689, 693 (3d Cir. 1988).

The plaintiff complained in his Rule 56(f) affidavit that he did not receive discovery. He referred generally to his interrogatories to the union and the university, which had been the subject of his unsuccessful motions to compel, and to the discovery served on various federal agencies. The affidavit failed to comply with Rule 56(f). The plaintiff did not explain what evidence he believed he would discover, and how that evidence would help him to oppose the motion. The courts below needed, but did not get, more than a conclusory statement that "I asked for some discovery and I think I did not get it." Bright did

not even satisfy the first two prongs of the test set forth in *Contractor's Ass'n*. The district court correctly so ruled.

Petitioner does not argue that the *Contractors Ass'n* test so departs from the standard of other circuits or from the rules to warrant granting the writ. He has not even shown that the test was wrongly applied in his particular case at all. There was no misapplication and thus no important issues of broad impact warranting the grant of the writ.

B. The Grant Of Summary Judgment

"Summary judgment may be granted when the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." There is no genuine issue of material fact unless there is "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249 (1986). "If the evidence is merely colorable, or is not significantly probative", summary judgment will lie. *Id.*

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact, " since a complete failure of proof concerning an essential element renders all other facts immaterial.

Celotex Corp. v. Catrett. 477 U.S. 317, 322-23 (1986).

The element essential to Petitioner's case was proof that he satisfied the various statutes of limitations and procedural prerequisites in filing his lawsuit.

Petitioner was hired in May 1984. He admittedly recognized in May 1984 that he was being offered discriminatory conditions of employment. He began work in September 1984. He first went to the AAUP with his problems no sooner than 1985. After receiving instructions on the deadline for filing grievances in early 1985, he ignored them and the AAUP until spring 1986. He criticized the AAUP's alleged lack of action for him at least as early as November 1985. Thereafter, in May 1986 and especially June 1986, he accused the AAUP of "fraudulent" actions in failing to represent him with regard to his salary-and-rank claim, and he claimed the AAUP had harmed him in early 1985 by not filing a grievance on time. In June 1986, after his grievance had been deemed untimely, he threatened to sue the AAUP for its alleged in action and demanded "$4.0 million" damages.

The Complaint was filed September 21, 1988, more than two years after plaintiff had explicitly accused the AAUP of the very misconduct charged in the Complaint.

1. The statute of limitations for 42 U.S.C. §§1981, 1983 and 1985

In the years since *Wilson v. Garcia*, 471 U.S. 261 (1985), the courts in the Third Circuit have uniformly applied the two year personal injury statute of limitations of N.J.S.A. 2A:14-2 to claims under 42 U.S.C. §§1981, 1983 and 1985(3). This Court's decision in *Owens v. Okure*, 485 U.S. 958 (1989) did not change the rule in New

Jersey. *Cito v. Bridgewater Township Police Department*, 892 F.2d 23 (3d Cir. 1989).

In November 1985 and June 1986, Bright accused the AAUP of failing to file grievances for him since early 1985.

As to all acts of the AAUP before September 21, 1986, two years before the Complaint was filed, the district court correctly applied precedent and granted judgment on plaintiff's §§1981, 1983 and 1985 claims.[4] The Court of Appeals correctly affirmed that grant. Nothing in the petition suggests that *Cito* misreads this court's rulings, or departs from rulings of other circuits. Nothing in the petition argues that the application to his case of *Wilson*, *Owens* and *Cito* to this case was either wrong or special.

2. The statute of limitations for 42 U.S.C. §1986

Unlike the other Reconstruction civil rights statutes, 42 U.S.C. §1986 contains its own limitations period: "But no action under the provisions of this section shall be sustained which is not commenced within one

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4. Professor Bright also alleged that the AAUP violated 42 U.S.C. §1988. Section 1988 is a purely procedural provision which creates no rights (except perhaps the right of the prevailing party to fees). *Moor v. Alameda County*, 411 U.S. 693, *reh. denied* 412 U.S. 963 (1973). To the extent that there may be substantive rights created by §1988, the statute of limitations should be two years. See *Cito*, above.

year after the cause of action has accrued." The plaintiff knew, in May 1985, well before September 21, 1987, one year before the Complaint was filed, of the AAUP's alleged failure to file his grievance on time which he considered to constitute the AAUP's neglect to prevent the violation of his rights under 42 U.S.C. §1985.

3. Title VII's procedural requirements

Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(e), requires that a charge of discrimination be filed with the EEOC within 300 days of the occurrence of the discrimination. This requirement is in the nature of a statute of limitations, which may be subject to estoppel or equitable tolling. *Zipes v. Trans World Airways*, 455 U.S. 385, 393 (1982).

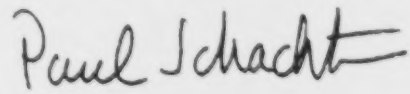
Bright admittedly filed no charge of discrimination at all against the AAUP. Bright did not claim ignorance of the EEOC processes. Instead, he admitted great familiarity with Title VII and the EEOC: he had filed charges as early as 1975, and again later in the 1970's. He also filed charges *three times* against Rutgers, in November 1985, May 1986 and March 1987. He did not file a charge against the AAUP because he believed, without any evidentiary support, that Rutgers and the union worked generally "in tandem", that the union had "no separate existence"; and that the union did not pay his paycheck. Reinhardt Aff., Ex. 1 at 296-297.

Even if the AAUP and Rutgers acted in tandem -- which the AAUP hotly disputes -- the EEOC charges were not timely. The courts below correctly applied well settled principles of exhaustion of administrative remedies. The petition does not reveal, nor are there, any special reasons to review the decisions below.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for certiorari in all respects.

Respectfully submitted,



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Dated: September 9, 1992